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Jepak Holdings Sdn Bhd v Ministry of Education Malaysia Asset Management Division (BPA) & Anor

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HIGH COURT (SIBU) — SUIT NO KCH-22NCvC-62/10 OF 2019 (HC2)
CHRISTOPHER CHIN JC
1 SEPTEMBER 2020

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Civil Procedure — Summary judgment — Application for — Plaintiff brought action against defendants for claim of work done and services rendered — Plaintiff applied for summary judgment — Whether application of summary judgment ought to be allowed — Whether O 73 r 5 of Rules of Court 2012 could prevent summary judgment application — Rules of Court 2012 O 14 r 1, O 73 r 5

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The plaintiff applied for summary judgment (encl 98) against the defendants in the sum of RM667,11,950.69 being a claim for works done and services rendered in relation to the provision of equipment and diesel for schools in Sarawak as well as the design for a solar hybrid system pursuant to a contract entered into between the parties. Subsequently, each party alleged the other was in breach but effectively the contract was eventually terminated. The plaintiff contended that the notice of termination by the defendants was unlawful. The plaintiff also sought for specific performance, non-forfeiture of their performance bond of RM21,863,870 and special damages of RM367,658,672.62. The court determined whether the plaintiff's application could be heard as the defendants cited the self-explanatory prohibition in O 73 r 5 of the Rules of Court ('the ROC'). The plaintiff's counsel contended that the O 73 r 5 of the ROC was unconstitutional and should be disregarded in the present application.

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Held, dismissing plaintiff's application under encl 98 with costs of RM15,000:

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(1) The powers of the court were not anyway curtailed by O 73 r 5. There was no prohibition in the courts conducting the full trial of the case and to adjudicate and decided based on the merits of the case. Order 73 r 5 was a prohibition to a particular procedural step and not a prohibition against proceedings. It prohibited a step but not the ultimate discretion of the court (see paras 25–26).

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(2) The court could not see major pressing hardship or injustice suffered if the summary judgment was denied and which a full trial on merits could not ameliorate. If the O 14 application was denied, the plaintiff suffered no prejudice or injustice as the plaintiff still had the preferred avenue of

seeking to prove their case in the full trial on the present matter. In any event, O 73 was already an immediate and paramount bar to the O 14 proceedings (see paras 27–29).

(3) The amount claimed by the plaintiff in present O14 application was a rather substantial RM667m plus. That being the case and in the interest of the parties and of justice the outcome of the suit was best adjudged after the full hearing of each parties' respective merits (see para 32).

[Bahasa Malaysia summary

Plaintif membuat permohonan untuk penghakiman terus (lampiran 98) terhadap defendan bagi jumlah RM667,11,950.69 sebagai tuntutan untuk kerja yang dilakukan dan perkhidmatan yang diberikan berkaitan dengan penyediaan peralatan dan diesel untuk sekolah di Sarawak serta reka bentuk sistem solar hibrid berdasarkan kontrak yang dimeterai antara pihak-pihak. Lanjutan daripada itu, pihak-pihak mendakwa satu sama lain telah melanggar dan secara efektif kontrak akhirnya ditamatkan. Plaintif berpendapat bahawa notis penamatan oleh defendan adalah tidak sah. Plaintif juga memohon perlaksanaan spesifik, bon prestasi yang tidak dituntut berjumlah RM21,863,870 dan ganti rugi khas sebanyak RM367,658,672.62. Mahkamah memutuskan sama ada permohonan plaintif harus didengar kerana defendan membangkitkan halangan sepertimana dalam A 73 k 5 Kaedah-Kaedah Mahkamah ('KKM'). Peguam plaintif berpendapat bahawa A 73 k 5 dari KKM tidak mengikut perlembagaan dan harus diabaikan dalam permohonan ini.

Diputuskan, menolak permohonan plaintif di bawah lampiran 98 dengan kos RM15,000:

(1) Kuasa mahkamah tidak dihalang oleh A 73 k 5. Tidak ada larangan oleh mahkamah yang mengendalikan perbicaraan penuh kes ini dan untuk membuat keputusan dan memutuskan berdasarkan merit kes. Aturan 73 k 5 adalah halangan untuk perlaksanaan prosedur tertentu dan bukan halangan terhadap prosiding. Ianya merupakan halangan bagi prosedur tetapi bukan budi bicara tertinggi mahkamah tersebut (lihat perenggan 25–26).

(2) Mahkamah tidak dapat melihat kesusahan atau ketidakadilan teruk yang dialami sekiranya penghakiman terus ditolak dan perbicaraan penuh terhadap merit kes tidak boleh dijalankan. Sekiranya permohonan A 14 ditolak, plaintif tidak mengalami prejudis atau ketidakadilan kerana plaintif masih mempunyai pilihan untuk membuktikan kes mereka melalui perbicaraan penuh terhadap perkara semasa. Walau apapun, A 73 sudah menjadi penghalang utama dan penting bagi prosiding A 14 (lihat perenggan 27–29).

(3) Jumlah yang dituntut oleh plaintif dalam permohonan A 14 ini adalah

RM667 juta yang agak besar. Oleh itu, demi kepentingan pihak-pihak dan keadilan, keputusan tuntutan tersebut adalah lebih baik diadili setelah pendengaran penuh apabila pihak-pihak masing-masing mengemukakan merit mereka (lihat perenggan 32).]

Cases referred to

Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals [2018] 1 MLJ 545, FC (refd)

Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd [2008] 4 MLJ 641, FC (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145, FC (refd)

Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat & another case [2017] 3 MLJ 561, FC (refd)

Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2010] 2 MLJ 333, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 16(1), 23, 24, 25
Government Proceedings Act 1956 s 29
Interpretation Acts 1948 and 1967 s 23
Rules of Court 2012 O 14, O 73 r 5, O 92 r 4
Rules of the High Court 1980 O 92 r 4

Bartholomew Lopez (Wejok Tomik and Silas Ling with him) (Gala & Tomik Advocates) for the plaintiff.

Leo Saga (Senior Federal Counsel, Attorney General's Chambers) for the defendants.

Christopher Chin JC:

[1] Under encl 98, the plaintiff applied for summary judgement against the defendants in the sum of RM667,121,950.69 being a claim for works done and services rendered in relation to the provision of equipment and diesel for schools in Sarawak as well as the design for a solar hybrid system pursuant to a contract entered into between the parties. Interest of 6.4% was also sought.

BRIEF BACKGROUND FACTS

[2] In June 2017 the defendants awarded a contract to the plaintiff described as 'Cadangan Pelaksanaan Menerusi Rundingan Terus Projek Bersepadu Sistem Solar Photovoltaic (PV) Hibrid dan Penyelenggaraan dan Operasi Genset/Diesel bagi 369 Sekolah Luar Bandar Sarawak' ('the contract' and 'the project'). The contract sum including GST was RM1,325,000,000.

[3] Subsequently, each party alleged the other was in breach but effectively the contract was eventually terminated and then this suit was instituted by the plaintiff seeking among other things that the notice of termination by the defendants was unlawful, specific performance, non-forfeiture of their performance bond of RM21,863,870 and special damages of RM367,658,672.62.

[4] Eventually in encl 98 the plaintiff applied on the 28 January 2020 for summary judgement in the sum of RM667,121,950.69 being, 'part of the plaintiff's claim for works done and services rendered'.

INITIAL ISSUE O 73 R 5

[5] I would first have to decide if this application can be heard at all as the defendants cited the self-explanatory prohibition in O 73 r 5 of the Rules of Court 2012('the ROC') which states:

> 5 (1) An application against the Government *shall not be made under Order 14, rule 1 or Order 81, rule 1* in any proceedings *against the Government* nor under Order 14 rule 5 in any proceedings by the Government. (Emphasis added.)

[6] If I rule that the plaintiff can maintain this O 14 action despite O 73 r 5, I would then consider the O 14 application proper. If my answer is in the negative then this matter ends here and the O 14 application by the plaintiff is not successful.

[7] At the outset O 73 r 5 is explicit in its language as it relates to summary judgement against the government and not specifically on injunctive relief or other remedy against the government.

SYNOPSIS OF THE ARGUMENTS BY THE PLAINTIFF IN RELATION TO O 73 R 5

[8] The plaintiff's counsel went to enormous lengths to seek to convince this court that O 73 r 5 is, in a sense, unconstitutional and should be disregarded in this application.

[9] A synopsis of the key arguments tendered by the plaintiff (in encl 423) to convince me, I can proceed to consider this application for summary judgement against the government despite the clear wording and prohibition of O 73 r 5 are as follows:

(a) O 92 r 4 that stipulates that — 'For the removal of doubt it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent power of court to make any order as may be necessary to

prevent injustice or to prevent an abuse of the process of the court';

(b) the case of *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 — where Edgar Joseph Jr FCJ took the view that O 92 r 4 of the (Rules of the High Court 1980) serves as a reminder and confirmation of the common law powers of the court; and

(c) the Rules of Court 2012 has its source in s 16(1) of the Courts of Judicature Act 1964 — Rules of Court may be made for the following purposes:

> (a) For regulating and prescribing the procedure (including the method of pleading) and the practice to be followed in the High Court ...

[10] Hence the ROC are intended to relate purely to procedure and therefore cannot restrict the right of the court to try or hear any matter as stated in O 92 r 4.

[11] That I had earlier granted an injunction against the government (encl 5) despite the clear language in s 29 of the Government Proceedings Act 1956 which says — 'a court shall not grant an injunction ...'. At this juncture it must be said that different considerations apply to injunctive remedies and I was persuaded by case law on that point and within the context of that application.

[12] The authorities cited in encl 5 application included that of *Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd* [2008] 4 MLJ 641 where the Federal Court held that the powers conferred to the court pursuant to the Court of Judicature Act 1964 ('the CJA') permits the court to issue an injunction despite the prohibition in another Act of Parliament, the Government Proceedings Act 1956.

[13] That on the reading of the CJA it is apparent that the Rules of Court are in the manner of subsidiary legislation and as such they cannot oust the fundamental jurisdiction of the High Court established in ss 23–25 of the CJA. In this respect the plaintiff cites s 23 of the Interpretation Acts 1948 and 1967 to the effect that — 'any subsidiary legislation that is inconsistent with an Act ... shall be void to the extent of the inconsistency'.

[14] The Government Proceedings Act and the CJA are equal in stature and one cannot overrule the other and hence the case law is relevant which shows that the Judiciary has struck down any decision of the Executive to oust the power of the courts.

[15] Reliance on O 73 r 5 is tantamount to an exclusion of liability or ouster clause bordering on being discriminatory.

[16] That the Federal Court in the case of *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat & another case* [2017] 3 MLJ 561 — rejected Parliamentary supremacy and that Malaysia has a written constitution and that the power of the Executive through Parliament is limited by the Constitution.

[17] In *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333 the Federal Court held that unless sanctioned by the Constitution itself, any statute that offends the basic structure may be struck down as unconstitutional.

[18] In *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545 the Federal Court sought to define the role of the courts:

> The courts have a constitutional function to perform and they are the guardians of the constitution within the terms and structure of the constitution itself ... The courts are the final arbiter between the individual and the State and between individuals inter se, and in performing their constitutional role they must of necessity and strictly in accordance with the constitution and the law be the ultimate bulwark against unconstitutional legislation or excesses in administrative action.
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> Indeed it has been said that the heart and core of a democracy lies in the judicial process. ... The exclusion by the Legislature including a State legislature, or even that limited judicial review strikes at the basic structure of the constitution.

[19] The defendants' decision to file an affidavit in reply deemed as a 'fresh step' and thus forfeited their right to object to the procedural irregularity. Numerous authorities were cited by the plaintiff in support of this. They also ventured that the correct approach would have been to make an application to set aside this proceeding on the basis of non-compliance or irregularity.

[20] As a corollary to the above point the plaintiff argued that the defendant's affidavit in reply indicate that they, the defendants, have submitted to the jurisdiction of this court to try this case by way of summary judgement.

APPRAISAL OF THE PLAINTIFF'S ARGUMENTS ON JURISDICTIONAL LIMITS IN THIS CASE

[21] I applaud plaintiff counsel's remarkable industry in their lengthy, comprehensive and persuasive arguments levied against the prohibition imposed by O 73 r 5. In a nutshell, the plaintiffs are saying that by curtailing the powers of the court in relation to summary judgement, O 73 r 5 is unconstitutional as it is an erosion of the fundamental and inherent jurisdiction of this court.

A **[22]** Their argument goes to the fundamental role of the Judiciary within the context of the Constitution and the separation of powers between the three branches of our democratic architecture. This court was persuaded earlier in the application for injunctive relief between the very same parties but in that instance there were decided cases from the appellate courts to guide this court
B and such cases were on point.

[23] The authorities cited by counsel for the plaintiff, though extremely persuasive, are not on O 73 r 5 per se.

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[24] As the plaintiff concedes, O 73 r 5 has its genesis from and is the embodiment of a piece of parliamentary legislation in the form of the Government Proceedings Act.

D **[25]** The powers of the court are not in anyway curtailed by O 73 r 5. There is no prohibition in the courts conducting the full trial of the case and to adjudicate and decide based on the merits of the case.

[26] Hence O 73 r 5 is a prohibition to a particular procedural step and not
E a prohibition against proceedings. It prohibits a step but not the ultimate discretion of this court.

[27] Perusing the plaintiff's case I see no major pressing hardship or injustice
F suffered by them if summary judgement is denied and which a full trial on merits could not ameliorate. Unless I am bound by stare decisis on this specific point I do not have the temerity to rule in defiance of an O 73 r 5 which has its roots from a piece of legislation being an instrument of the Legislative branch of our government.

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[28] At this point I am not persuaded to decide against the Rules of Court 2012 which is the procedural authority for this court. It is clear in my mind that if I deny the O 14 application here, the plaintiff suffers no prejudice or injustice as they still have the preferred avenue of seeking to prove their case in the full
H trial on this matter.

[29] I am not prepared to consider this O 14 application even, as suggested by the plaintiffs, the defendants have taken a step in these proceedings thus submitting to the jurisdiction of this court to hear this application. In any
I event, O 73 r 5 is already an immediate and paramount bar to these O 14 proceedings.

[30] As the O 73 r 5 hurdle is not cleared I need not assess if there are in fact triable issues.

[31] The plaintiff and the project with the defendant have been implicated in a widely publicised ongoing corruption and money laundering trial where obscene amounts of money are being alleged to have nefariously exchanged hands.

[32] The amount claimed by the plaintiff in this present O 14 application is a rather substantial RM667m plus. That being the case and in the interest of the parties and of justice the outcome of this suit is best adjudged after the full hearing of each parties' respective merits.

ORDER

[33] Order 14 application of the plaintiff under encl 98 is dismissed with costs of RM15,000 subject to allocatur. I order an early date to be fixed for pre-trial case management to facilitate an early trial

Plaintiff's application under encl 98 dismissed with costs of RM15,000.

Reported by Mohd Kamarul Anwar